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SPECIFIC PERFORMANCE, INJUNCTIONS, AND DAMAGES IN THE GERMAN LAW.

I. RIGHTS AND CLAIMS.

OLDER systems of law developed the two following maxims: 1. Not every right as such is entitled to be enforced by the courts, but the courts give their assistance in cases only where the right may be brought under one of the prescribed forms of procedure. Such was the idea of the Roman law, where rights could be enforced only if the magistrate found them to fit in one of the prescribed forms. That law was based on a system of actions divided into actions *in rem* and *in personam* with numerous subdivisions, and the parties who appeared before the magistrate had to obtain from him for the enforcement of their rights one of those forms. The same idea, namely, that a right may not be enforced unless it fits in one of the legal forms, is the basis of the English division of actions into assumpsit, replevin, detinue, and the like.

2. The enforcement of a right by the court does not mean that the plaintiff is entitled to obtain the object of his right specifically, but as a rule his compensation in money is sufficient to do justice. Therefore a purchaser cannot sue for the delivery of the thing purchased if the seller does not perform his obligation, but he must be satisfied with compensation in money. Likewise the master cannot sue his servant for the performance of services; the person who has suffered an injury to his property cannot sue for specific reparation; but in all such cases an equivalent in money must be accepted by the injured party. Such was the principle of the Roman law in its older periods,[1] and such is the rule governing the English law of today.

[1] 2 Crome, Bürgerliches Recht, 18; and as to damages, 2 Crome, 66; 2 (1) Dernburg, Bürgerliches Recht, 77. The references to Dernburg are given for vols. 1 and 3 from the third edition, for vol. 2 (parts 1 and 2) from the "first and second" edition.

The conception of the modern German law is quite different. The two leading principles of it are that every right may be enforced by the courts, and that the purpose of such enforcement is the creation of the condition which would exist if the right was complied with voluntarily and without judicial help. In other words, a person has as many actions as he has rights recognized by the law; the right to sue is nothing else than the formal aspect of the right itself. Furthermore, the purpose of a lawsuit is to create a situation or condition which would exist if no violation or infringement of a right had arisen at all. For instance, a person has hired a horse which is not delivered to him and he sues for delivery; or, he has entered into a contract of partnership, his partner does not fulfill his part of the agreement, and he sues for specific performance; or, an employee has bound himself not to compete with his master, he breaks his contract, and his master seeks to enjoin him; or, finally, some one by trespassing on my property has injured it and I sue him to repair the damage.

The right to sue is therefore the formal side of the right itself. The beginning of a lawsuit, however, requires generally more than the mere existence of a right. The right of ownership, for instance, gives me the full power to use a thing in any way I wish and to prevent other persons from interfering with my right. The power which I have over the thing must be respected by everybody. But my right to sue does not exist until my right is interfered with by a given individual, and it is therefore dependent upon a personal relation between two conflicting parties.[1] In case of relative or obligatory rights the situation is different. Here by the mere creation of the right the two persons concerned, namely, the creditor and the debtor,[2] are known, and the creditor's right to sue the debtor is given as soon as the obligation is due.[3]

Thus the enforcement of every right requires a relation between at least two individuals. This right of enforcement arising out of

[1] 1 Crome, 179.

[2] The terms "creditor" and "debtor" are used here, according to the German terminology, for the person who is entitled to performance (including payment of money) and the person who is bound to perform.

[3] No violation of the obligatory right is necessarily required for its enforcement. This becomes apparent in the following case. A creditor may make a loan of money to a debtor on the condition that he may claim it back at any time he likes. The creditor in such case can sue the debtor immediately and without refusal on the part of the debtor, no breach of contract by the debtor being required for such lawsuit. 1 Crome, § 35, note 8. Successful plaintiffs who might have obtained their rights without suit are charged with all the expenses of the lawsuit. Code Civ. Proc., § 93.

private rights is called by the German Civil Code a claim (*Anspruch*), and the claim is defined as the right to demand an act or forbearance from another person.[1] The claim based on relative or obligatory rights (contracts, *quasi*-contracts, torts, *quasi*-torts) is, in fact, the right itself, but in the case of absolute rights (rights in things, like ownership or mortgage, family rights, inheritance rights, rights of authorship, patent rights, and the like) a claim does not exist until some one has infracted the right. Absolute rights contain unlimited possibilities for claims, but after a claim arises therefrom its nature is the same as in the case of obligatory rights.[2]

Every right may be enforced and become the foundation of a claim. There are, however, exceptions where rights are recognized by law, payments on account of such rights are valid and good, performance of such rights is considered as contractual performance, but, nevertheless, the law refuses to give claims for these rights and to grant their enforcement (the so-called imperfect obligations). For instance, manufacturers and laborers are allowed to enter into all kinds of agreements to obtain most favorable conditions for manufacture on the one hand and labor on the other hand; and therefore a large number of trusts and labor unions exist in Germany. But all members of such agreements are entitled to withdraw at any time; no lawsuits can be based on relations arising from trusts or trade unions; no damages can be obtained for breach of such agreements, and neither trusts nor trade unions have the right to enforce any fines against their members.[3] In the same way, contracts with marriage brokers, or obligations created by gaming or betting, are good and valid, and payments made in performance of such contracts cannot be recovered as unjust enrichment, but no possibility of suing is given on account of such contracts.[4] Besides these imperfect obligations, it is provided for many claims mainly arising from the family law, for instance for disputes between husband and wife, that these

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[1] Civil Code, § 194.

[2] Concerning the theory of the *Anspruch* (claim) *cf.* 1 Windscheid-Kipp, Pandekten, §§ 43–46; 1 Dernburg, § 42; 1 Crome, § 35; 1 Planck, Kommentar z. B. G. B., 3 ed., 52; 1 Standinger, Kommentar z. B. G. B., 3 ed., 585, 586.

[3] Trade-Regulation Act (*Gewerbeordnung*), § 152. *Cf.* 1 von Landmann, Kommentar z. G. O., 5 ed., 541–551.

[4] Civil Code, §§ 656, 762. A lottery contract is binding and enforceable if the lottery is ratified by the government; in all other cases the provisions of § 762 apply. Civil Code, § 763.

claims shall be settled not by lawsuit but by *ex parte* decree of the guardianship court.[1]

For the enforcement of a right it is usually supposed that the claim is due, and therefore not dependent on condition or limitation of time. However, since 1900 lawsuits for future or conditional performance might be instituted in the following cases.[2]

1. Claims for loaned money due at a future date. If the defendant immediately acknowledges the plaintiff's right and the plaintiff had no immediate occasion for suing, the court will charge the plaintiff with all costs, although he is given title against the defendant.[3]

2. Complaints demanding the surrender of the possession of a house or a piece of land under lease at the future termination of said lease. Before 1900 lessors of houses or lands were often greatly inconvenienced in cases where their lessees were not willing to give up the leased property. The creditor had to wait until the termination of the lease and could not begin his lawsuit before this time. Lessees often used defenses of which the only purpose was to gain time at the expense of the lessor and which, after evidence was taken, were shown to be frivolous. Today under the new provisions the lessor may obtain a judgment before the termination of the lease and execute his judgment immediately after the end of the contract.[4]

3. In case of periodical income or debts to be paid by installments suit may be brought for installments due after the time at which judgment is given.

4. In all cases dependent upon condition[5] an action may be brought for future performance if, under the circumstances, the plaintiff has some reason to believe that the debtor will not perform at the right time.

Under these new provisions the creditor is entitled to execute his judgment against the debtor immediately after the claim is due.[6]

II. Enforcement of Claims.

The purpose of the enforcement of claims is, as was said above, to create a condition which is in accordance with the right from

[1] *Cf.*, for instance, Civil Code, §§ 1357, 1358, and the writer's article, "Non-Contentious Jurisdiction in Germany," in 21 HARV. L. REV. 479.

[2] Code Civ. Proc., §§ 257–259. [3] *Ibid.*, § 93. [4] *Ibid.* § 721.

[5] 1 Gaupp-Stein, Kommentar z. C. P. O., 8 and 9 ed., 583, 584.

[6] Code Civ. Proc., §§ 726, 751.

which the claim has sprung. For instance, an absolute right, like a patent, is violated; then the purpose of the claim is to stop further violations and to compensate the person injured for such infringement; after these purposes have been reached and the claims growing from the patent right satisfied, the condition corresponding to the patent right is re-established. Or, after a claim based on a relative right is enforced and, for instance, a contractor is condemned to build the house agreed upon, the contractual claim is satisfied.

As, therefore, the enforcement is merely the formal side of the right[1] and the method of enforcement completely corresponds to the claim which springs from the right, the question, in which cases specific performance is granted, in which cases injunctions and in which cases damages, has no fundamental importance in the German law. However, for the purpose of obtaining a comparative view of the law of this country, the function of the three mentioned methods of enforcement in the German procedure may be discussed.

1. *Specific Performance.* It is the remedy which corresponds to the claim of one person, the creditor,[2] against another person, the debtor, to do an affirmative act. In all cases, therefore, where the debtor is bound to do such affirmative act, the creditor has the claim for specific performance. Hence the creditor sues for the delivery of the thing purchased, for the construction of the house, for the rendering of services; the husband sues his wife who has left him for the restitution of his marital rights. The fact that the debtor refuses to perform has no effect on the creditor's claim and on his obtaining a judgment for performance. The way in which such judgment may be executed and the fact that perhaps it may become impossible to get satisfaction by execution do not deter the court from giving judgment.[3] It follows that the claim for specific performance is barred only if the performance is or becomes impossible.

This is, however, only a general principle. As to its application, three questions arise. First: Is, by the impossibility of performance, the debtor's obligation entirely extinguished, or is it changed into an obligation to make compensation in damages? Second: Is the creditor, as long as the performance is not impossible, bound to claim performance, or is he under some conditions entitled to ask

[1] 1 Crome, 550; Windscheid-Kipp, *l. c.*

[2] *Cf.* above, p. 162, n. 2.

[3] 2 Crome, 129; 1 Gaupp-Stein, 550.

for compensation in money instead of performance? Third: Is any claim for performance given against third persons who have obtained the object of the performance?

FIRST: *Impossibility of performance and the debtor's duties arising therefrom.* The Code distinguishes the impossibility of performance which existed at the time when the contract was concluded ("original impossibility") from the impossibility which happened later on ("subsequent impossibility"). And the Code further distinguishes between impossibility which is absolute and exists for everybody ("impossibility") and the impossibility which merely exists for the debtor and has its reason in his personal condition ("inability"). As a result of these distinctions, four combinations arise, namely: original impossibility, original inability, subsequent impossibility, and subsequent inability.[1]

A. Original impossibility. "A contract for an impossible performance is void."[2] For instance, if A sells to B the city of Boston, such agreement has no effect at all. However, there are exceptions.

a. Claim for specific performance based on a void contract: "The impossibility of performance does not prevent the validity of the contract if the impossibility can be removed, and the contract is intended to be binding only if the performance becomes possible. If an impossible performance is promised subject to any other condition, precedent, or limitation of a definite time, after which it is to become binding, the contract is valid if the impossibility is removed before the fulfilment of the condition or the arrival of the time."[3] For instance, a city intends to sell a public park as building grounds. Under this expectancy a real estate dealer A enters into a contract of sale with B concerning the park territory. The contract becomes valid and creates a claim for specific performance as soon as the city has offered the park to the private individuals.

b. Claim for full damages, based on a void contract. If a person enters into a contract the performance of which is impossible, and he expressly guarantees the performance, he is bound to compensate the other party for all damages.[4] For instance a person sells a void patent guaranteeing its validity, he assigns a claim barred by the statute of limitation, and promises that the claim will

[1] 2 Planck, pp. 67 *et seq.*; 2 (1) Dernburg, pp. 128 *et seq.*; 2 Crome, pp. 33 *et seq.*, 121 *et seq.*

[2] Civil Code, § 306. [3] *Ibid.*, § 308. [4] 2 Planck, 118.

be satisfied; further, by legal presumption, "the seller of a claim or any other right warrants the legal existence of the claim or the right."[1]

c. Claim for compensation for actual outlay, based on a void contract. "A person who, in concluding a contract for an impossible performance, knew or ought to have known that it was impossible, is bound to make compensation for any damage which the other party has sustained by relying upon the validity of the contract, not, however, beyond the value of the interest which the other party has in the validity of the contract. The duty to make compensation does not arise if the other party knew or ought to have known of the impossibility."[2] For instance, A asks a broker, B, to buy for him a given kind of bonds to be delivered at the end of the month. B accepts. A now makes arrangements to sell these bonds at the time of delivery and expects to make a profit of $1000. His outlay on account of the business (travelling expenses, advertisement, and the like) is $200. Later on the broker discovers that the kind of bonds ordered does not exist. He is on account of his negligence bound to compensate A for any outlay up to the amount of $1000.

B. Original inability. The contract is valid, and a claim for specific performance may be based on it.[3] For instance, a contractor agrees to build a house although he has neither sufficient means nor sufficient credit, or a boycott of the laborers against him personally at the time of the agreement prevents him from performing the contract; or a bookseller contracts to sell a book, although he is not the owner of the book, but has to order it from the publisher. In all such cases the contracts are valid, a direct action for specific performance is given, and the debtor is condemned unless he proves that no default can be imputed to him or his employees.[4] "A debtor is responsible, unless it is otherwise provided,[5] for willful default and negligence. A person who does not exercise ordinary care acts negligently.[6] For instance, in the

[1] Civil Code, § 437.

[2] *Ibid.*, § 307.

[3] 2 Planck, 68; 2 Crome, 160. *Contra*, 2 (1) Dernburg, 131, who gives the opinion that not a claim for specific performance but for full damages lies. However, as compensation in damages under the Code means restitution in kind (see below, *sub* 3), the differing opinion of this author does not, in most of the cases, give a different result from the opinion of the majority of writers. Differing, French Civil Code, art. 1599.

[4] Civil Code, § 278.

[5] For instance, a promisor of a gift, a finder of a thing lost, and others are responsible only for gross negligence. Civil Code, §§ 521, 968.

[6] Civil Code, § 276.

foregoing illustration, the contractor would be excused from performance if he at the time of the conclusion of the contract had good reason to believe that the boycott of the laborers against him would shortly come to an end.

C. Subsequent impossibility. "The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance for which he is not responsible occurring after the creation of the obligation."[1] For instance, where a person has sold a house and before delivery the house is destroyed by fire without default of the seller, his obligation ceases. But "where the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance."[2]

The consequences of subsequent impossibility are therefore:

a. Either termination of the obligation, if the debtor is without default.

b. Or compensation by way of damages. Compensation by way of damages means, in the first place, restitution in kind (see below *sub* 3), but as this in case of impossibility cannot be done, pecuniary compensation takes place.

D. Subsequent inability. "If the debtor after the creation of the obligation becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible."[3] Such subsequent inability arises, for instance, if after the conclusion of the contract a singer who made an engagement for a given evening catches a cold preventing him from performing, if the thing which the debtor was bound to deliver is stolen from him, if the outbreak of a strike of the laborers prevents the contractor from building the house or the coal mine from delivering the coal. However, merely temporary impediments do not, as a rule, create "inability" on the part of the debtor, and the loss of the title in the thing which he was bound to deliver has such effect only if he by the exercise of his contractual duties is unable to obtain the title back. Therefore, if the debtor has fraudulently transferred the title to a third person, he must undertake even disproportionate outlay to determine the third person to retransfer the title, and his inability to perform arises only if such efforts are without success.[4]

If the object of performance is designated only by species and

[1] Civil Code, § 275, par. 1.
[2] *Ibid.*, § 280.
[3] *Ibid.*, § 275, par. 2.
[4] 2 Planck, 69, 70.

delivery of an object of the designated species is possible, no inability to deliver is considered by law.[1] For instance, a man sells a given kind of wheat which is usually to be obtained in Chicago, but at the time of delivery the agreed kind of wheat is sold out in Chicago and the same kind can be obtained only in London or Montreal. The seller has to perform and order it from these places.

Now, as, under the provision mentioned above, the subsequent impossibility and the subsequent inability have the same effect, the consequence of the debtor's subsequent inability is

a. Either termination of the obligation, if the debtor is without default (he suddenly becomes sick, the thing is stolen from him without his negligence).

b. Or compensation by way of damages (the debtor has negligently or fraudulently conveyed the thing to a third person, who refuses to reconvey it, the contractor by his pretentious attitude to the laborers has caused them to strike). Compensation by way of damages means, in the first place, restitution in kind (see below *sub* 3), and only in the cases stated below, pecuniary compensation.[2]

In all cases *sub* C and D, if in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or assignment of the claim for compensation.[3] For instance, the house sold and not yet delivered is destroyed by fire; the buyer has a claim to the insurance money. Or the debtor sells the object, which he was bound to deliver, to a third person; the creditor has a claim to the purchase price.[4]

SECOND : *Is the creditor, as long as the performance is not impossible, bound to claim performance, or is he, under some conditions, entitled to ask for compensation in money instead of specific performance?*

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[1] Civil Code, § 279.

[2] *Ibid.*, §§ 280, 275, par. 2; 2 Planck, 81, and authorities cited.

[3] Civil Code, § 281.

[4] 2 Planck, 84–86, who does not, in opposition to the majority of the writers, consider the § 281 Civ. Code applicable to the last-mentioned illustration. As to the application of the stated rules to the so-called mutual contract, in other words, what happens to the purchase price if the delivery of the thing becomes impossible, or to the servant's wages if the master prevents him from rendering services, or to the claim of one partner if the other partner becomes unable to perform his duties, and the like see Civil Code, §§ 323–325.

Under the principle stated *sub* I, namely, that rights are to be exercised and enforced in complete accordance with their contents, the answer is that the creditor is bound to claim specific performance just as the debtor has the duty of specific performance. The change of the creditor's claim into compensation in money is therefore admitted only in exceptional cases. Two ways are given to the creditor for this purpose:

A. The creditor sues for performance. After he obtains a final judgment, he allots to the debtor a reasonable period for performance with a declaration that he refuses to accept performance after the expiration of the period. After the period has expired without performance, the creditor may demand pecuniary compensation.[1]

B. The creditor puts the debtor who neglects to perform in due time in delay, giving him a warning after maturity of the obligation. No warning is necessary if a certain time is fixed for the performance.[2] The consequence of the debtor's delay is a claim of the creditor for compensation for the damages arising from the delay, besides the claim for specific performance, which remains unaffected.[3] But

a. If the creditor has no further interest in the performance in consequence of the delay, he may, by refusing performance, demand pecuniary compensation.[4] For instance, a surgeon is engaged for an urgent operation. All preparations are made, but the surgeon forgets to come and is out of town. Another surgeon may be employed and the extra expenses charged to the former surgeon.

b. If in the case of a mutual contract (contract of sale, exchange, for services, work, partnership, and others) one party is in delay in respect of the performance due from him, the other party may allot him a fixed reasonable period for performing his part with a declaration that he will decline the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for nonperformance. The fixing of a period is unnecessary if, in consequence of the default, the performance of the contract is of no use to the other party.[5] For instance, a tailor promises to finish a suit next Sunday, but does not perform. I go Monday, to his shop, call his attention to the fact that he is in delay, and give him a reasonable period of

[1] Civil Code, § 283. [2] *Ibid.*, §§ 284, 285. [3] *Ibid.*, § 286, par. 1.
[4] *Ibid.*, § 286, par. 2. [5] *Ibid.*, § 326.

some days to deliver the suit, with the declaration,[1] that I shall decline to accept the suit after the expiration of the period. If the delivery is not effected, his duty to compensate me for damages caused by his delay arises.[2]

C. By the debtor's refusal to perform, the creditor does not, as a rule, obtain the right to choose compensation instead of performance. But by such refusal the fixing of the period mentioned above and to some extent also the warning by the creditor, required to put the debtor in delay, become unnecessary.[3]

THIRD: *Is any claim for specific performance given against third persons who have obtained the object of the performance?* The discussion of this so-called *jus ad rem* may here be limited to the question: If B has a claim against A for the delivery of a corporeal thing and later on the title in the thing or the possession passed from A to C, has B any claim directly against C?

The Roman law was based on the fundamental distinction between *jus in rem* and *jus in personam*, and therefore relative rights created a claim against third persons in very exceptional cases. For instance, by the *actio quod metus causa* (belonging to the class of *actiones in rem scriptae*) a person C, although innocent, was bound to restore goods to B which he had obtained by the threats of A against B and in which he had acquired the title.[4] In the older German law the idea was more general, that a person B who enters into an agreement with A the purpose of which is the delivery of a corporeal thing from A to B, by such agreement acquires a *jus ad rem* against any third person. Distinctions were created merely by the question if such rule should apply to every third person or only to such third persons as were not *bona fide*.[5] The latter principle was accepted by the French Civil Code in the provision that if a person has contracted to give the same movable to two different persons, the one who is put in actual possession is preferred and remains owner though his title thereto be later in

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[1] This declaration is essential.

[2] 50 Reichsgericht, 255 (1902); 2 Planck, 150–161. As to the method in which the amount of damages is paid, *cf.* Kipp, *Schadensersatz wegen Nichterfüllung* in *Verhandlungen des 27. deutschen Juristentages*, vol. 1, pp. 248 *et seq.* The person who ordered the suit may, of course, if he prefers, sue the tailor for specific performance and execute the judgment against him, if the tailor is a man of unusual ability, in accordance with the rule *sub* III, 4 b, otherwise according to the rule *sub* III, 4 a.

[3] 2 Planck, 92, 93, 158, and cases and authorities cited.

[4] 1 Windscheid-Kipp, § 45, note 6; 2 *ibid.*, § 462.

[5] 2 Gierke, Deutsches Privatrecht, 608–611; 3 Dernburg, 195–197.

date, provided his possession is in good faith.[1] Furthermore, if a seller of a piece of land B had reserved his right of re-purchase and the buyer A sells and conveys the land to C, B can exercise his right of re-purchase directly against C, although C had no knowledge of the right of re-purchase.[2]

The Prussian Code contains the provision that a person who has a claim to an individual thing may sue any third person who, when obtaining the thing, was aware of the older right of another person to obtain the thing. Therefore, the same thing cannot be sold to different persons, if the later acquirer is aware of the previous contract.[3] But when the system of land-registration was introduced in Prussia,[4] this rule was not accepted and became therefore limited to rights in personal property.

The German Civil Code is based on the fundamental difference of *jus in rem* and *jus in personam* and has not admitted the *jus ad rem*. Nevertheless, many provisions lead to the result that contractual claims for the delivery of a thing may be directed against third persons who acquired the thing with knowledge of the former claim. Such provisions are as follows:

a. A person who wilfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damage.[5] This rule has been given by the authorities the following interpretation: Where A sells a thing first to B, and thereupon with the intention[6] to destroy B's right, to C, and transfers the title to C,[7] who is aware of A's intention, B may sue C in damage, and the result of such suit would be an order for the reconveyance of the title to A.[8] Or, where B has sold a thing to A and reserved to himself the right of repurchase, and A, after he has obtained the

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[1] French Civil Code, Art. 1141; Crome, Allgemeiner Teil des französischen Privatrechts, 220–221.

[2] French Civil Code, Art. 1664 (limited to real property by Art. 2279); 2 Zachariae-Crome, Französisches Civilrecht, 502 *et seq.*; 1 *ibid.* 348.

[3] 1 Prussian Code, 19, § 5, 10, § 25; 1 Dernburg, Prussisches Privatrecht, 2 ed., 410–415.

[4] By statute of May 5, 1872.

[5] Civil Code, § 826.

[6] It is not sufficient that A should know the result of his act; he may, for instance, act under pecuniary embarrassment, hoping to acquire the thing back later.

[7] The transfer of title in personal property is generally effected by transfer of the possession. Civil Code, §§ 929 *et seq.* As to real estate, registration is required, *cf.* the writer's article mentioned above, in 21 HARV. L. REV. 485–488.

[8] Planck in the article cited in the next note (p. 173).

title from B, transfers the title to C, with the intention as above, and C knows the facts, B may sue C to the same effect.[1]

b. Many ways are provided by the Code to make merely obligatory rights effective *in rem*. The following illustrations may be given:

aa. A has agreed to sell his house to B, but for some reason (for instance, because B is not yet able to pay the purchase price) the registration of B as owner and the declaration of the parties in the Land-Court, which is required for that purpose, is postponed. In such cases a caution (*Vormerkung*) in B's favor may be registered either with A's consent or by temporary injunction. B does not acquire any title in the land by the caution, but on the other hand A is unable to destroy B's expectancy by selling the land to C.[2]

bb. A has sold his horse to B, but wants to continue the use of the horse for some time. Parties may agree that the title shall pass to B[3] immediately and that A shall keep the horse as B's bailee.[4] If subsequently A sells the horse to C, who is aware of those facts, or does not know them in consequence of gross negligence, C does not acquire any title and may be sued by B for reconveyance of the horse.

cc. B has sold and delivered his book to A and reserved to himself the right of re-purchase within three months. If before this time A sells and delivers the book to C, who knows B's right of re-purchase, C nevertheless acquires title to the book.[5] But if B and A, when making the contract, expressly provide[6] that in case B exercises his right of re-purchase, the title shall immediately revest in B, A is unable to transfer the title to C, who is in bad faith, because the effect of such condition subsequent is *in rem* and effective against everybody to whom such condition is known or unknown in consequence of gross negligence.[7]

c. If A transfers the title in a thing which he is bound to deliver to B on account of unjust enrichment or of B's ownership, to C, an

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[1] 62 Reichsgericht, 137; 2 (2) Dernburg, 99, 100; 3 *ibid.* 197; 2 Crome, 490; 2 Planck, 407. The Reichsgericht goes even beyond the rule stated above, and is in so far criticized by Planck in *Deutsche Juristenzeitung*, 1907, p. 10.

[2] Civil Code, §§ 883–885; 3 Dernburg, 156–164; 3 Crome, 174–191.

[3] By the mere contract of sale no title passes. Civil Code, § 433.

[4] The so-called *lex commissoria*. Civil Code, § 930.

[5] He may under given conditions be sued under Civil Code, § 826; see above, *sub a*.

[6] An express provision is necessary, as rights of re-purchase or rescission are by the Code treated as obligatory. Civil Code, §§ 499, 346; 54 Reichsgericht, 340 (1903); 1 Standinger, Kommentar z. B. G. B. 504.

[7] Civil Code, §§ 158, 161, 932, par. 2.

innocent person, gratuitously, B has generally a direct claim for reconveyance.[1] The same rule applies if the thing came out of B's and into C's possession, *e. g.*, C has stolen or found the thing.[2]

2. *Injunctions.* Every claim the purpose of which is a forbearance of the debtor gives to the creditor the right of injunction if the debtor violates his duty. A claim for the forbearance of the debtor may be based on all kinds of rights. The main source for negative claims is the absolute rights, like ownership, inheritance rights, patents, copyrights, and others. Everybody who interferes with such rights creates, in favor of the creditor, a claim to enjoin him. Negative claims based on obligatory rights may either be created by express agreement, for instance, by a contract not to take part in certain transactions, *e. g.*, not to bid at a public auction, not to start a competitive business; or, such negative claims may be contained in contracts of a generally affirmative character, like the duty of a commercial employee not to enter into competition with his employer during his employment.[3] Finally, torts which are of a continuous character, like unfair competition, entitle the injured party to a decree of injunction against the tort-feasor.

These kinds of injunction are based on negative claims and can therefore be obtained only after a right has been violated, or, at least, was due. The enforcement of such claims is not in principle different from the enforcement of claims for specific performance.

But, also, temporary or interlocutory injunctions of a mandatory or prohibitory nature may be obtained for the protection of rights which are merely threatened without actual violation. The cases in which temporary injunctions can be obtained are as follows:

a. "Temporary injunctions, concerning the object of litigation, may be issued, if there is any danger that by a change of the actual situation the enforcement of the right of one of the parties would be prevented or made subject to grave difficulties."[4]

b. "Temporary injunctions may be issued also in case of any litigation for the purpose of creating a temporary situation, if it is shown to be necessary to avoid material harm or to prevent violence threatened or to protect any other legal interests."[5]

Under these provisions a very large space is provided for the issuing of injunctions and the courts have made a liberal use of their powers. All kind of rights, absolute and relative rights,

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[1] Civil Code, §§ 816, 822.
[2] *Ibid.*, § 281.
[3] Commercial Code, § 60.
[4] Code Civ. Proc., § 935.
[5] *Ibid.*, § 940.

property and family rights, and the like have been protected by injunctions, and it was not required that a lawsuit should have been already begun, but the mere existence of an object of litigation in connection with any threatened change of it was considered to be a sufficient reason for an injunction.[1] In urgent cases injunctions may be obtained *ex parte*.[2]

There are, however, differences in the use of this remedy compared with this country. In Germany the function of the courts is limited to the decision of private rights, of claims between individuals based on the private law. Now many claims which have their source in the private law are connected with claims of a public character. The main illustration is given by the law of torts: many claims based on torts (injuries to life, body, health, ownership), create at the same time a criminal claim for the state's authorities (manslaughter, assault and battery, embezzlement). In such cases the individuals are not prevented from suing for damages which they have suffered. However, the courts would hardly give their assistance to prevent threatened violence by the way of civil injunctions, but would send the applicant to the police. Therefore in cases of criminal attempts to destroy property, for instance, by striking laborers, the police powers of the state would prevent injury from being done and no action for a civil injunction would, as a rule, lie.[3]

Furthermore, the courts, even where property rights are threatened, would not, by granting injunctions, touch questions of administrative law or political character. For this reason injunctions could not be obtained against state officials acting in an unconstitutional or otherwise illegal manner. In all these cases special remedies are provided by the administrative law of the different German states.[4]

Finally, those kinds of injunctions which are due to the dis-

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[1] As to details and cases, *cf.* 2 Gaupp-Stein, 774 *et seq.*, 816 *et seq.*, 825 *et seq.*

[2] Code Civ. Proc., § 937, par. 2.

[3] The following opinion is given by the Supreme Court of the United States; "There must be some interference actual or threatened with property or rights of pecuniary nature, but when such interferences appear, the jurisdiction of a court of equity arises and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law." *In re* Debs, 158 U. S. 564, 593. This opinion would probably not be followed by the German courts in general.

[4] The remedies against illegal or unconstitutional acts of a state's officials are on principle the same as against decrees of courts, namely, appeals to the Superiors or to special administrative courts. But the state and city authorities could hardly be enjoined from doing an act.

tinction between law and equity (for instance, against multiplicity of suits, undue influence, etc.) have, of course, no analogies in the German procedure, where no such distinction exists.

3. *Damages.* The main *source* of claims for damages is torts. This branch of the law has, however, lost much of its importance as a source of damages, since, by Imperial Statutes,[1] employers of all kinds (owners of factories, mines, carriers by railroad or boat, persons engaged in agriculture, forestry) are bound to compensate their employees for all kinds of accidents which happen in the course of their business. The employees lose their claim for compensation only if they are proved to have intentionally caused the accident.[2] The employers are, for the purpose of compensation, organized in *quasi*-public corporations (*Berufsgenossenschaften*), and claims arising from accidents are settled by administrative courts, composed of employers and employees.[3]

As regards contracts, the cases in which damages are primarily agreed upon are exceptional, as in contracts of insurance or guaranty. Usually a claim for damages arises only either instead of a claim for specific performance under the conditions shown *sub* 1, or besides claims the main purpose of which is specific performance or injunctions.[4]

Concerning the *reasons* for damages they are usually two, namely: first, any wilful or negligent act by which rights are violated, and, second, a causal relation between this act and the injury done. The latter point has been liberally interpreted by the courts.[5] As to the former point, the Code provides that in many cases a person is liable for damages although no fault can be imputed to him. For instance, a person who keeps an animal is bound to make compensation in damages if by the animal a person is killed or his body or health is injured.[6] Or persons who are by insanity or tender age unable to commit a tort are nevertheless bound to make a reasonable compensation to persons injured by

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[1] Reënacted July 5, 1900.

[2] *Cf.* for instance Gewerbe-Unfall-Versicherungs-Gesetz, § 8.

[3] *Schiedsgerichte*, appeal goes to the *Reichs-Versicherungs-Amt.*

[4] For instance, in the case of delay (see II, 1, Second B) or in case of violation of absolute rights (injunctions against further violations and damages for the injuries already done).

[5] 53 Reichsgericht, 114 (1902): The noise made by an elevated train in Berlin frightened a horse which was on the street; the horse ran away and killed a person. The railroad was considered to be liable in damages.

[6] Civil Code, § 833.

them.[1] Or a person who has obtained a temporary injunction which later proves to be unjustified, is liable to compensate the injured party for damages even where no fault may be imputed to him.[2] Railroads are liable in damages unless they prove that the accident was caused by *vis major* or by negligence of the person killed or injured.[3]

If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depend upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party.[4] For instance, a man sends a messenger with a box to another person and conceals the fact that the box contains jewels; the messenger negligently loses the box; he is not bound to make full compensation. Or a man allows his neighbor's horse to injure his property although he could easily prevent it; full damages cannot be obtained.

As regards the *method of fixing* damages, it corresponds to the principle, stated above, that the purpose of the enforcement of claims is the creation of a condition which is in accordance with the right. The rule, therefore, is that a claim by way of damages has not the purpose of securing money damages but restitution in specie. The Civil Code says:

"A person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred." [5]

Therefore, if somebody has intentionally killed my horse which was of an average kind, or negligently loses my book, I sue him for specific reparation, which means an equivalent horse or book. Likewise, if somebody has broken my window, he has to provide for the reparation; if my neighbor's dog has torn my clothes, I send them to his tailor.[6]

However, there are exceptions to this principle of restitution in kind, most of them given in favor of the creditor and not of the debtor.[7]

a. If compensation is required to be made for injury to a person, or damage to a thing, the creditor may demand, instead of restitution in kind, a sum of money necessary to effect such restitution.

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[1] Civil Code, § 829.
[2] Code Civ. Proc., § 945.
[3] Liability Act of June 7, 1871.
[4] Civil Code, § 254.
[5] *Ibid.*, § 249, par. 1.
[6] 2 Crome, 66; 2 Kohler Bürgerliches Recht, 125; 2 (1) Dernburg, 78.
[7] Civil Code, §§ 249–251.

b. The creditor may fix a reasonable period for the restitution in kind by the person liable to compensate, with a declaration that he will refuse to accept restitution after the expiration of said period. After the expiration the creditor may demand compensation in money if the restitution is not effected in due time.

c. In so far as restitution in kind is impossible or insufficient to compensate the creditor, the person liable shall compensate him in money.

d. The person liable may compensate the creditor in money if restitution in kind is possible only through a disproportionate outlay.

It is apparent from what has been said that, although compensation in damages primarily means restitution in kind, neither the creditor nor the debtor is so strictly bound to choose this method as to choose specific performance in cases where it is possible, but can more easily substitute the method of compensation in money.

In the *amount* of damages, also, lost profits are included. Profits are deemed to have been lost which could have been expected with probability according to the ordinary course of things or according to the particular circumstances, *e. g.*, according to the preparations and provisions made.[1] Therefore a person who is entitled to full damages (including lost profits) is not bound to prove that he actually suffered a loss of profits, but it is sufficient for him to show that in all probability he could expect those profits.[2] For instance, a merchant buys goods to be delivered at a later day, the delivery agreed upon is not effected, in the meantime the market value of the goods increases, the merchant therefore was very likely to sell them at this higher price, he is entitled to claim the increase in the market value as lost profits, even if he could not expect it.[3]

The amount of damages is extended in case of many torts. For instance, in case of causing death to a person who at the time of the injury had to furnish maintenance to a third party (wife and children) who are in consequence of the death deprived of such maintenance, the injuring party has to furnish the full maintenance during the presumable duration of the life of the person killed.[4]

For an injury which is not an injury to property, compensation in money may be demanded only in the cases specified by law,

1 Civil Code, § 252.

2 2 Planck, 28–31 and authorities cited.

3 2 Planck, *ibid.*

4 Civil Code, §§ 844, 845.

for instance in the case of seduction or for any injury done to the body or health of another.[1]

Finally, in exceptional cases, instead of full damages only actual outlay may be demanded (*negatives Vertragsinteresse*).[2]

III. Execution of Judgments.

The enforcement of the claims by way of specific performance, injunction, restitution in kind, and damages, has the ultimate purpose of establishing a condition which is in accordance with a right. Execution of a judgment is the last step in accomplishing this purpose. In accordance herewith judgments may be executed in any of the following ways:

1. Defendant is condemned to pay money to the plaintiff.[3]

a. The *choses* in his possession, in so far as they are necessary for the satisfaction of the claim, are attached and after a reasonable time sold by public auction and the money is paid to the creditor up to the amount due.

b. Choses in action and any property of the debtor which is in the hands of third persons are attached by judicial order, forbidding the debtor and the garnishee to dispose of any of these things. If the garnishee admits the existence of his obligation to the debtor, he may deliver the thing to the sheriff, who disposes of it in the same way as in the case of direct attachment; but if the garnishee denies the right of the debtor, then the creditor has to sue him, taking the place of a legal assignee of the debtor.

c. Execution in real property is effected by registration of a lien, by sequestration, or by public auction under judicial supervision.

2. Defendant is condemned to deliver a corporeal thing to the creditor.

a. If the thing is a movable thing, the sheriff takes it out of the possession of the debtor and hands it over to the creditor. If the thing cannot be found, the creditor may have the debtor swear an oath that he has not the thing, neither does he know where it is. If the debtor swears the oath, the creditor of course can only sue him for pecuniary damages. If the debtor refuses

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[1] Civil Code, §§ 253, 847.

[2] For instance, in the case mentioned *sub* 1, First A *c*, *cf.* further Civil Code, §§ 122, 179.

[3] Code Civ. Proc., §§ 803–882.

to swear, or does not appear in court, he is fined for contempt of court and confined in jail up to six months.[1]

b. If the thing is a movable thing in the possession of a third party, the rules under 1, *b* apply.[2]

c. If the thing to be delivered by the debtor is an immovable thing or a ship, the sheriff puts the debtor out of possession and gives possession to the creditor.[3]

3. Defendant is condemned to make a declaration, for instance, to declare his consent as to a registration of the plaintiff as owner of a piece of land in the land register; or, to declare his consent that a given amount deposited in his favor may be paid out to the plaintiff. In such case, by the mere fact that the judgment has become final the declaration is deemed to be given, and no act on the part of the debtor is necessary. The creditor may use such judgment with the same effect as if the debtor had made a declaration; for instance, he may become registered landowner of land belonging to the debtor.[4]

4. Defendant is condemned to perform an act other than of the kind described above.

a. In case this act can be performed by another person as well, the creditor on his application has to be authorized by the court to appoint another person instead of the debtor and at the debtor's expense. A decree fixing the amount of such expenses against the debtor may be obtained at the same time.[5] For instance, the debtor is condemned to render services or to make building constructions or to perform any transactions (like purchases of bonds, chattels) which require average skill. In all such cases the creditor may obtain the permission to appoint another person in place of the debtor to perform his obligation.

b. Defendant is condemned to perform an act which can be done by him alone.[6] For instance, he has to sign a bill of exchange, he has to give an account, he has to assist in the institution of legal proceedings. If he refuses to do it, he may be fined up to fifteen hundred marks or confined up to six months.

There are, however, some exceptions to the last rule, namely:

aa. If a spouse who has left the household is condemned to return, and in similar cases, no execution is given on such decree, but the decree may be used by the successful party only for the foundation of a divorce suit.

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[1] Code Civ. Proc., §§ 883, 884, 899–915. [2] *Ibid.*, § 886. [3] *Ibid.*, § 885.
[4] *Ibid.*, § 894. [5] *Ibid.*, § 887. [6] *Ibid.*, § 888.

bb. By suggestion of the House of Representatives (*Reichstag*), since 1900 the rendering of services has become excepted from the above rule. Now the condemnation of a person to render services which can be done by another person in the same way may be executed in accordance with rule 4, *a*. On the other hand, the courts always have decided that services which require special and individual ability, as in art or science, are no fitting subject of execution at all. Therefore, prominent singers have never been forced by fines or jail sentence to sing, nor have celebrated painters been forced to paint a picture agreed upon, nor authorities in science to write treatises on their special subjects.[1] Therefore this amendment has no great importance.

5. Defendant is condemned to forbear action or to suffer an act of the creditor.[2] If he violates this obligation, he may be fined up to fifteen hundred marks, or confined up to six months, for each violation, with an aggregate maximum of two years.

In all the cases under 2 to 5 the creditor's right to ask for pecuniary damages remains unaffected.[3]

In case of temporary injunctions the court may order any measure which it considers as convenient for the enforcement of its order.[4]

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[1] 2 Gaupp-Stein, 736, 739. A condemnation could be obtained in all such cases (see above), and such judgment may become useful as title for damages and for other purposes. *Cf.* 1 Gaupp-Stein, 550.

[2] Code Civ. Proc., § 890.

[3] *Ibid.*, § 893.

[4] *Ibid.*, § 938.